Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-762

CAROL MAUREEN SOSNA, ETC., APPELLANT

V.

THE STATE OF IOWA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

Docketed November 10, 1973
Probable Jurisdiction Noted February 19, 1974

APPELLANT'S REPLY AND SUPPLEMENTAL BRIEF

PAUL E. KEMPTER
JAMES H. REYNOLDS
FRED H. McCAW
630 Fischer Building
Dubuque, Iowa 52001

Attorneys for Appellant

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DIVISIONS I AND II

The following list is believed to be a current compilation of reported decisions involving Constitutional challenges to divorce residency requirements.

Cases upholding the constitutionality of durational residency requirements for divorce:

Ashley v. Ashley, 217 N.W. 2d 926 (Nebraska, 1974)

Caizza v. Caizza, 291 So. 2d 569 (Florida, 1974)

Coleman v. Coleman, 291 N.W. 2d 530 (Ohio, 1972)

Davis v. Davis, 210 N.W. 2d 221 (Minnesota, 1973)

Place v. Place, 278 A. 2d 710 (Vermont, 1971)

Porter v. Porter, 296 A. 2d 900 (New Hampshire, 1972)

Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Florida, 1973)

Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa, 1973)

Stottlemyer v. Stottlemyer, 302 A. 2d 830 (Pennsylvania, 1972)

Whitehead v. Whitehead, 492 P. 2d 939 (Hawaii, 1972)

Cases holding that durational residency requirements for divorce are unconstitutional:

Fiorentino v. Probate Court, 310 N.E. 2d 112 (Massachusetts, 1974)

Larsen v. Gallogly, 361 F. Supp. 305 (D. Rhode Island, 1973)

McCay v. South Dakota, 366 F. Supp. 1244 (D. South Dakota, 1973)

Mon Chi Hueng Au v. Lum, 360 F. Supp. 219 (D. Hawaii, 1973)

State v. Adams, 522 P. 2d 1125 (Alaska, 1974)

Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wisconsin, 1971)

DIVISION III

Because Appellee has elected to ignore, in effect, the question presented by the Court in its Note of Probable Jurisdiction, the issues embodied in the question are denied the light of adversary investigation. The following discussion is presented in the interest of fuller scrutiny.

In support of the proposition that the District Court below should not have proceeded to the merits of the Constitutional issues, it could be argued that principles of comity or res judicata preclude federal court determination of constitutional claims previously adjudicated in the state courts. Support for this position may be found in Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362 (1923), and in England v. Louisiana Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). Rooker, however, articulates the rule that

a federal district court is without jurisdiction to review a state court determination of a federal Constitutional claim. Here, Appellant sought not to invoke nonexistent appellate jurisdiction, but the original jurisdiction of the federal district court under 42 U.S.C. §§ 1983 and 28 U.S.C. §§ 1343 for the purpose of obtaining equitable relief from a deprivation of rights which was effected by a state court.

England sets forth the requirements for reserving the right to return to the federal district court after being bounced into the state court under the Abstention Doctrine. The rule seems to be that if the litigant "freely and without reservation submits his federal claims for decision by the state courts" 375 U.S. at 419, 11 L. Ed 2d at 447, he cannot return to the federal court for relitigation of his

federal claim.

The instant case involves no question of abstention. The statute under challenge is plainly not susceptible to an interpretation which would avoid the Constitutional issues. There is also no question of a return to the federal court. An action for dissolution of marriage can originate nowhere but in the state district court. It is difficult to imagine initiating a dissolution action under the present Iowa law with as plain a defect as insufficient duration of residency and not informing the state court of the Constitutional objections which led Appellant to believe she had a right to seek a dissolution in spite of the statutory residency requirement. To argue that such a circumstance should subsequently bar Appellant from seeking redress in the federal district court is to worship form and to ignore the mandate of 28 U.S.C.

§§ 1343. In addition, to suggest that the state district court's disposition of Appellant's petition amounted to a full litigation of the Constitutional issues is a painful hyperflexion of reason. In the state district court's own memorandum decision (Jurisdictional Statement, Appendix B, P.4) it is unambiguously stated:

> "Finally, it is well established in this state that fine line decisions involving questions of constitutional law, rights and privileges, are best not decided in the forum of the district court and at this level. This Court therefore elects to follow the clear statutory law of this state ..."

The issues were not fully litigated and decided, but were expressly avoided.

The vague principle of comity should not be allowed to stand in the way of a federal action for relief under 42 U.S.C.

§§ 1983 where the state judiciary to which comity would offer deference, respect, and good will is the same entity alleged to have committed the unconstitutional deprivation of rights. A federal forum must be provided in such a case. See Averitt, "Federal Section 1983 Actions After State Court Judgment," 44 Colo. L. Rev. 191 (1972). To bar Appellant from federal court on the ground that she has elected a state remedy where her dissolution action could only be brought in the state court would be to draw an unreasonable distinction between those who seek redress after filing the state action and those who proceed to federal court in a direct attack on the statute.

It could be argued that the state disposition of the federal Constitutional issues should be given res judicata effect by the federal district court, but that

ignores Federal Rule of Civil Procedure 8 (c) which requires that res judicata be pleaded as an affirmative defense. Appellee has never raised the question and has effectively waived any such claim. In addition, for res judicata to apply, it is necessary that the issue or claim to be precluded has been fully litigated and was necessary to the judgment, Commissioner v. Sunnen, 333 U.S. 591, 92 L. Ed. 898 (1948). Here, the state court gave only a casual consideration to the Constitutional issues and expressly declined to make a final determination. See, e.g., Jackson v. Official Representatives, 487 F. 2d 885 (CA 9 1973).

It has not been finally determined whether the usual rule of res judicata barring federal court relitigation of issues decided by state courts should be applied in actions under 42 U.S.C. §§ 1983. Florida State Board of Dentistry v. Mack,

430 F. 2d 862 (CA 5 1970), cert. den., 401 U.S. 960, 91 S. Ct. 971 (1971) (White, J. and Burger, C. J., dissenting), citing Brown v. Chastain, 416 F. 2d 1012, 1014 (CA 5 1969) (Rives, J. dissenting). Appellant's local circuit court of Appeals has suggested that res judicata may not bar a proper claim for relief under §§ 1983. Jensen v. Olson, 353 F. 2d 825 (CA 8 1965).

In light of this lack of judicial guidance and of the fact that neither Appellee nor any of the three members of the lower court detected this issue, if a new or clearer rule on the effect of state judgments on federal §§ 1983 actions is to emerge, Appellant should have the same relief from adverse effect allowed the appellant in England v. Louisiana Medical Examiners, 375 U.S. 411, 422, 11 L. Ed. 2d 440, 449 (1964).

Section 1983 of 42 U.S.C. is intended

to provide individuals with a swift and unfettered form of redress from deprivation of federal Constitutional rights under color of state law. It contemplates the possibility that such rights may be infringed by a state judiciary and that a federal forum must be available for relief:

> "The very purpose of Section 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights --- to protect the people from unconstitutional action under color of state law, 'whether such action, be executive, legislative, or judicial'. Ex Parte Virginia, 100 U.S. at 346, 25 L. Ed. 676." Mitchum v. Foster, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162 (1972).

To say that a federal forum is unavailable under res judicata because the §§ 1983

defendant is a state court is to render §§ 1983 useless against unconstitutional judicial action. Just as rules of state court finality must be disregarded in federal habeas corpus actions in order to maintain a critical lifeline for the protection of fundamental individual liberties, so must the procedure attending §§ 1983 actions be kept free of debilitating constraints.